

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARIA QUESADA,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Civil No. 10-cv-1139-JM (POR)

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S CROSS-MOTION FOR
SUMMARY JUDGMENT**

[ECF No. 13]

[ECF No. 18]

I. INTRODUCTION

On May 26, 2010, Plaintiff Maria Quesada filed a complaint pursuant to section 405(g) of the Social Security Act requesting judicial review of the final decision of the Commissioner of the Social Security Administration (hereinafter "Commissioner" or "Defendant") regarding the denial of Plaintiff's claim for disability insurance benefits. (ECF No. 1.)

On November 29, 2010, Defendant filed an answer (ECF No. 8), and lodged the Administrative Record (hereinafter "AR"). (ECF No. 9.) On May 21, 2011, Plaintiff filed a Motion for Summary Judgment. (ECF No. 13.) On July 1, 2011, Defendant filed a Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment. (ECF No. 18.) Plaintiff filed an Opposition on July 16, 2011. (ECF No. 19.)

The Court finds the motions appropriate for submission on the papers and without oral

1 argument pursuant to Local Rule 7.1(d)(1). For the reasons set forth herein, the Court hereby
 2 **DENIES** Plaintiff's Motion for Summary Judgment (ECF No. 13) and **GRANTS** Defendant's
 3 Cross-Motion for summary judgment (ECF No. 18).

4 **II. PROCEDURAL BACKGROUND**

5 On February 20, 2007, Plaintiff filed an initial application for Disability Insurance Benefits.
 6 (AR 162-64.) Plaintiff alleged a disability beginning on April 1, 2002. (AR 162.) Plaintiff's claim
 7 was denied initially on May 25, 2007 (AR 77-80), and upon reconsideration on March 6, 2008 (AR
 8 84-88). Plaintiff filed a timely request for a hearing before an Administrative Law Judge
 9 (hereinafter "ALJ") on July 19, 2008. (AR 89-90.) On August 21, 2009, Plaintiff testified at an
 10 administrative hearing before an ALJ. (AR 34-74.) She was represented by Stuart Atcheson, Esq.
 11 (AR 34.) Dr. Arthur Brovender,¹ a medical expert, and Nellie Katsell, a vocational expert, also
 12 testified at the hearing. (AR 34; 57-74.) On September 29, 2009, the ALJ denied Plaintiff benefits.
 13 (AR 20-32.) The decision of the SSA became final when the Appeals Council adopted the ALJ's
 14 findings by a decision dated March 30, 2010. (AR 1-4.) Thereafter, Plaintiff filed the instant action
 15 on May 26, 2010. (ECF No. 1.)

16 **III. FACTUAL BACKGROUND**

17 Plaintiff was born on July 9, 1959 in Gomez Palacio, Durango, Mexico and moved to the
 18 United States at approximately age 28 in 1987. (AR 38; 314.) Plaintiff alleges disability due to
 19 multiple back and shoulder injuries. (AR 49-51.) Plaintiff first injured her right arm in a November
 20 2001 work-related accident. (AR 50.) On February 11, 2002, Plaintiff tripped and fell while
 21 working as a delivery driver for United Courier Services, further injuring her right shoulder and
 22 back. (AR 39, 372-73.) Around the same time, Plaintiff also injured her arm in an automobile
 23 accident. (AR 50-51.) As a result of her alleged disability, Plaintiff claims she has been unable to
 24 work since February 2002. (AR 50.)

25 **A. Plaintiff's Date Last Insured**

26 As an initial matter, the Court notes the Administrative Record in this case is voluminous

27
 28 ¹The Court notes that at various points in the record, Dr. Brovender is referred to as Dr. Burlinger, likely as the result of a transcription error. (AR 27, 29, 57.)

1 and contains medical records dated well after Plaintiff's date last insured of December 31, 2002. At
2 her hearing, Plaintiff argued her date last insured was December 31, 2007. (AR 52.) The ALJ,
3 however, determined Plaintiff was not fully insured after 2002 and therefore found Plaintiff's date
4 last insured was December 31, 2002. (AR 25.) Specifically, the ALJ stated:

5 The claimant argues that her date last insured is December 31, 2007. She is
6 mistaken. To be eligible for Disability Insurance Benefits one must not only have
7 sufficient quarters of coverage, 20 quarters of coverage in the last 40 quarters, one
8 must also be "fully insured" (20 CFR 404.130). In this case, while the claimant has
acquired sufficient quarters of coverage to potentially be insured into 2007 using
the 20/40 test, she was not "fully insured" after December 31, 2002.

9 To be "fully insured" one must have a quarter coverage for each year after 21 (20
10 CFR 404.110(b)(2)). In this case, the claimant was born on July 9, 1959. As such,
11 she reached age 21 in 1980. Thus, to be insured in 2003 or thereafter, she would
12 require 22 quarters of coverage for 2003 and 23 quarters of coverage for 2004, and
so on. In this case, the claimant has only acquired 21 quarters of coverage total.
Therefore, she is not "fully insured" after 2002, and thus her date last insured is
December 31, 2002 (Exhibit 1D).

13 (*Id.*) Plaintiff does not dispute the ALJ's determination of her date last insured in her Motion for
14 Summary Judgment. (*See* ECF No. 13-1.) Accordingly, the Court applies the December 31, 2002
15 date of last insured to its analysis in this case.

16 The Court further notes the Administrative Record contains medical records relating to
17 Plaintiff's shoulder and back injuries, as well as various psychiatric disorders, pain disorders,
18 diabetes and bladder dysfunction. In her application for benefits, Plaintiff claimed she had been
19 unable to work because of a "disabling condition on April 1, 2002." (AR 162.) At her hearing,
20 Plaintiff seemed to testify she had been unable to work since 2002 because of her back and shoulder
21 injuries, in combination with incontinence issues. (AR 50-51.)

22 In his opinion, the ALJ noted Plaintiff was "diagnosed, after her date last insured, with
23 symptoms of anxiety and depression, borderline intellectual functioning, as well as a pain disorder."
24 (AR 26.) He did not consider these conditions in his analysis, however, because he concluded "there
25 is no reliable medical evidence of psychiatric or cognitive impairment on or before the claimant's
26 date last insured." (*Id.*) He further recognized the record reflects cervical complaints and
27 allegations of bladder dysfunction. (*Id.*) Again, the ALJ did not address these conditions because he
28 found there was "no medical evidence of these conditions being presen[t] or symptomatic prior to

December 31, 2002.”² (*Id.*)

Plaintiff also does not dispute these findings in her Motion for Summary Judgment. (*See* ECF No. 13-1.) In fact, Plaintiff does not even mention her psychiatric disorders, pain disorders, diabetes or bladder dysfunction in the briefing before the Court. (*Id.*; ECF No. 19.) Thus, because Plaintiff appears to challenge the ALJ’s findings with regard to her back and shoulder injuries only, the Court limits its discussion to the medical evidence of these conditions.

B. Medical Evidence

1. Treating Physician Evidence

a) Dr. Jeffrey Bernicker

On March 21, 2002, Plaintiff’s primary physician referred her to Dr. Bernicker, an orthopedic specialist. (AR 224.) Plaintiff complained of pain in her lower back, leg, and right shoulder. (*Id.*) She described a constant, sharp pain from her lower back that prevented her from lifting more than 8-10 pounds and claimed she could not sit for more than one hour at a time. (AR 225-26.) She further reported experiencing intermittent pain and numbness in her left leg and right shoulder. (AR 226-27.)

From the history and records provided, Dr. Bernicker stated it was reasonable to assume Plaintiff’s pain was the result of her workplace injury on February 11, 2002. (AR 231.) Dr. Bernicker examined her lumbar spine region, reporting tenderness and trace muscle spasm. (AR 229.) Upon reviewing her February 25, 2002 MRI results, Dr. Bernicker found mild spondylosis of the lower lumbar spine, most pronounced at L4-5. (AR 228.) He concluded Plaintiff’s back would

² Upon careful review of the record, the Court notes there is some evidence Plaintiff experienced symptoms of bladder dysfunction prior to her date last insured. At her hearing, Plaintiff testified her bladder had “been hurting” since February 2002. (AR 51, 54.) In a report dated August 27, 2002, Dr. Mooney stated Plaintiff “has some bladder problems from time to time.” (AR 236.) In 2008, Dr. William Moseley, a urologist, found it was unclear whether the etiology of Plaintiff’s symptoms was related to her 2002 work-place injury. (AR 770). Conversely, Plaintiff’s treating physician, Dr. Bernicker, claimed Plaintiff reported discomfort with bowel movements, “but not with bladder function.” (AR 226, 1032.)

Even if the ALJ erred in finding Plaintiff exhibited no symptoms of bladder dysfunction on or before her date last insured, Plaintiff does not raise this issue in her Motion for Summary Judgment. (*See* ECF No. 13-1.) Moreover, to the extent Plaintiff presented symptoms of bladder dysfunction prior to her date last insured, there is not substantial evidence in the record to support a claim for disability benefits based on Plaintiff’s back and shoulder injuries in combination with a bladder dysfunction. (AR 26.) Based thereon, the Court does not address the ALJ’s opinion with regard to Plaintiff’s alleged bladder dysfunction in this order.

1 likely respond well to chiropractic and aquatherapy protocols. (AR 230-31.) As to Plaintiff's
2 shoulders, Dr. Bernicker found her right shoulder showed a slightly lower range of motion than her
3 left. (AR 229-30.) He concluded Plaintiff demonstrated symptoms consistent with an impingement
4 disorder and recommended an MRI of the shoulder to rule out a rotator cuff tear. (AR 231.)

5 On May 9, 2002, Dr. Bernicker reevaluated Plaintiff's condition. (AR 1026.) Plaintiff
6 reported persistent, constant low back pain extending through both lower extremities into her toes
7 with diffuse numbness and tingling. (*Id.*) She had not responded to the aquatherapy protocol. Dr.
8 Bernicker noted Plaintiff appeared to be in "significant distress" and indicated her desire to proceed
9 with lumbar surgery. (AR 1027.) Dr. Bernicker recommended a lumbar discography, an injection
10 technique used to evaluate back pain in patients who have not responded to less invasive forms of
11 therapy. (*Id.*)

12 Dr. Bernicker evaluated Plaintiff again on July 15, 2002, following her lumbar discography.
13 (AR 212, 1021.) The discography results indicated there was significant morphologic changes of
14 the discs at L4-5 and L5-S1. (AR 1021.) Dr. Bernicker "felt that these disc [sic] were pathologic to
15 a high degree of confidence." (AR 1021-22.) Though Dr. Bernicker explained conservative
16 methods of care could yield a result, Plaintiff reiterated her desire to proceed with surgical lumbar
17 fusion. (AR 1022.) Dr. Bernicker described the procedure in detail and received Plaintiff's
18 informed consent before authorizing surgery. (*Id.*) However, Plaintiff did not undergo surgery at
19 that time.

20 b) Dr. Bruce Van Dam

21 In January 2003, Plaintiff's attorney referred her to Dr. Bruce Van Dam, an orthopedic spine
22 specialist. (AR 956.) Plaintiff complained of lumbosacral pain associated with bilateral lower
23 extremity radicular pain. She also complained of pain in her right shoulder. (AR 957.) She stated
24 she felt most comfortable assuming a fetal position on her right side. She claimed to have difficulty
25 sleeping and was unable to sit or stand in the same position for long periods of time. (*Id.*)

26 In Dr. Van Dam's opinion, Plaintiff most likely sustained an aggravation of a pre-existing
27 lumbar condition. (AR 959.) He found Plaintiff suffered from instability and stenosis at L4-5 with
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1 discogenic lumbar pain at L5-S1, likely the result of her industrial injury. (*Id.*) Dr. Van Dam further
 2 reported Plaintiff had a partial tear in the supraspinatus tendon of her right shoulder. (AR 960.)
 3 Based on her condition, Dr. Van Dam concluded Plaintiff was temporarily totally disabled. (*Id.*) He
 4 found Plaintiff was unlikely to improve absent surgical intervention for the lumbar injury. (*Id.*)

5 The record indicates Dr. Van Dam continued to treat Plaintiff for several years and
 6 consistently opined that Plaintiff remained temporarily totally disabled. (*See* AR 379-618; 862-92;
 7 936-60.) He continued to recommend Plaintiff undergo surgery for both her back and shoulder
 8 injuries. (*Id.*) Dr. Van Dam further maintained that she did not present any signs of “psychiatric
 9 illness or malingering.” (AR 348, 352.) Instead, he claimed other physicians may have
 10 misinterpreted her “cultural response to the injuries” as an exaggeration of symptoms.³ (AR 352.)
 11 Ultimately, on February 8, 2007, Dr. Van Dam performed Plaintiff’s lumbar spine surgery at L4-5
 12 and L5-S1. (AR 930-31.)

13 2. Examining Physician Evidence

14 a) Dr. Vert Mooney

15 On August 27, 2002, Dr. Vert Mooney evaluated Plaintiff on behalf of the State
 16 Compensation Insurance Fund. (AR 233-34.) Dr. Mooney reviewed Plaintiff’s medical records and
 17 work history and conducted a physical examination. (AR 234-39.) Plaintiff complained of pain
 18 throughout her posterior torso up to the neck, along with pain in the right shoulder and legs. (AR
 19 238.) Dr. Mooney diagnosed Plaintiff with an impingement syndrome in her right shoulder,
 20 discogenic pain syndrome, and a persistent hip strain. (AR 239.)

21 In addition, Dr. Mooney responded to several questions posed by the claims adjuster. Dr.
 22 Mooney stated Plaintiff’s current method of treatment was “making no difference” in alleviating her
 23 symptoms. (AR 239.) While Dr. Mooney generally recommended active progressive exercise
 24 programs to treat back injuries, he found that Plaintiff was in too much distress to follow such a

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 26 ³ In June 2003, Dr. Van Dam referred Plaintiff to Dr. Miguel Alvarez for a psychology consultation. (AR 284.)
 27 Plaintiff complained of severe pain and discomfort during the examination. (AR 286.) Plaintiff claimed she hoped surgery
 28 would alleviate some of her pain; however, she did not expect that she would be “totally pain free” following surgery. (*Id.*)
 Dr. Alvarez diagnosed Plaintiff with anxiety and depression, as well as borderline intellectual functioning (non-industrial).
 (AR 290.)

1 program. (AR 240.) Thus, Dr. Mooney recommended epidural injections and physical therapy
 2 exercises instead. (*Id.*) Plaintiff reiterated her desire to undergo spinal surgery; however, Dr.
 3 Mooney found Plaintiff was “not a good surgical candidate” due to very global pain complaints.
 4 (*Id.*) He informed Plaintiff she would “absolutely not” improve if she underwent surgery. (*Id.*) He
 5 further questioned the sincerity of Plaintiff’s complaints of global pain, as she had no back pain
 6 when originally evaluated. (*Id.*) However, given her “very severe subjective complaints,” Dr.
 7 Mooney concluded Plaintiff could not return to her customary occupation at the time and stated she
 8 “currently appears to be disabled.” (*Id.*) It does not appear that Dr. Mooney made any
 9 recommendations regarding Plaintiff’s subjective complaints of global pain.

10 b) Dr. Richard Ostrup

11 On October 29, 2002, Plaintiff visited Dr. Richard Ostrup for an initial worker’s
 12 compensation neurosurgical evaluation. (AR 243-47.) Dr. Ostrup reviewed Plaintiff’s medical
 13 records and work history and conducted a physical examination. (AR 243.) Plaintiff complained of
 14 pain in her lower back, neck, right shoulder, and left leg. (AR 244.) Dr. Ostrup noted Plaintiff
 15 “seemed to be in quite a lot of pain” in her lumbar area during the examination. (AR 245.)

16 Dr. Ostrup diagnosed Plaintiff with lumbar sprain as a result of her February 11, 2002
 17 accident. (AR 246.) While her discogram suggested disease at L4-5 and L5-S1, Dr. Ostrup found
 18 Plaintiff was a “very poor surgical candidate.” (*Id.*) In fact, he opined that surgery may worsen
 19 Plaintiff’s condition. (*Id.*) He noted Plaintiff has “marked exacerbation of her complaints” and
 20 tested “very positive for numerous Waddell’s signs,” i.e. non-pathologic symptoms.⁴ (*Id.*)
 21 Accordingly, Dr. Ostrup strongly recommended Plaintiff pursue conservative treatment measures.
 22 (*Id.*)

23 c) Dr. Harvey Wieseltier

24 Dr. Harvey Wieseltier, an orthopedic surgeon and agreed medical evaluator, examined
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26 ⁴ “Waddell’s signs” are a group of physical signs that may indicate a non-organic or psychological component to
 27 lower back pain. Waddell’s signs are also used to detect malingering or exaggeration in patients complaining of lower back
 28 pain. See Waddell, Gordon; John McCulloch, Ed Kummel, Robert Venner (March/April 1980), “Nonorganic Physical Signs
 in Low-Back Pain,” *Spine* 5 (2): 117-125.

1 Plaintiff on April 24, 2003.⁵ (AR 249-72.) Plaintiff complained of pain and numbness in her neck,
 2 an occasional sharp pain in her mid back, a constant sharp pain in her lower back that radiated down
 3 her legs, and a constant sharp pain in her right shoulder. (AR 253.) Based on the physical
 4 examination and his review of Plaintiff's medical records, Dr. Weiseltier diagnosed Plaintiff with
 5 degenerative disc disease in the cervical spine, cervicobrachial syndrome in the right upper
 6 extremity, mild spondylosis at L4-5, disc desiccation and subtle annular bulge at L5-S1,
 7 inappropriate examination behavior consistent with somatoform pain disorder, and medial and
 8 lateral epicondylitis of the right elbow.⁶ (AR 262.)

9 Dr. Weiseltier found several objective and subjective factors of disability, but he also noted
 10 factors of exaggeration. (AR 265-67.) Dr. Weiseltier concluded Plaintiff's condition precluded her
 11 from heavy work, repetitive or prolonged neck movements, and repetitive work at or above shoulder
 12 level. (AR 267-68.) Based on Plaintiff's stated job position, Dr. Weiseltier found her condition
 13 rendered her unable to perform her usual and customary duties. (AR 268.) Dr. Weiseltier further
 14 noted there had been varying opinions as to whether Plaintiff should undergo surgery. (*Id.*) In his
 15 opinion, Plaintiff was not a surgical candidate because signs of "symptom amplification." (AR 270.)
 16 Rather, Dr. Weiseltier concluded Plaintiff would benefit from therapy for her neck and right elbow,
 17 as well as injections in her right shoulder. (AR 271.)

18 **C. The Hearing**

19 **1. Plaintiff's Testimony**

20 Plaintiff testified at her Social Security Administration hearing before ALJ John D. Moreen
 21 on August 21, 2009. (AR 36-57.) Plaintiff stated she was born on July 9, 1959 in Gomez Palacio,
 22 Durango, Mexico and moved to the United States at approximately age 28 in 1987. (AR 38; 314.)
 23 Plaintiff completed her education up to the sixth grade in Mexico. (AR 38.) She speaks little
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25 ⁵ According to the ALJ, an agreed medical evaluator is "a medical source that the parties to the action, the employer
 26 and the worker, more specifically their attorneys, agree can provide fair and impartial assessment of the injured worker's
 27 impairments and limitations." (AR 28.)

28 ⁶ At some point, Dr. Wieseltier recommended Plaintiff be referred to a pain management program to address her
 somatoform pain behavior. (AR 287.)

1 English and can read and write only in Spanish. (AR 38.) Prior to 2002, Plaintiff worked various
 2 jobs in labor, janitorial service and delivery. (AR 38-48.) These positions required Plaintiff to lift
 3 and carry items ranging from ten to forty pounds in weight. (AR 40-48.)

4 Plaintiff described three serious injuries during the hearing. Plaintiff first injured her right
 5 arm and shoulder in a November 2001 work-related accident. (AR 50.) On February 11, 2002,
 6 Plaintiff tripped and fell while working as a delivery driver for United Courier Services, further
 7 injuring her right shoulder and back. (AR 39, 372-73.) Around the same time, Plaintiff also injured
 8 her arm in an automobile accident. (AR 50-51.) Plaintiff testified that she has not worked since that
 9 time.⁷ (AR 39.) At the time of the hearing, Plaintiff lived with her mother and a friend; however, she
 10 was unable to do any housework. (AR 39.) She claimed to receive approximately \$650 in monthly
 11 income from a Worker's Compensation policy. (AR 39, 56.)

12 As a result of her injuries, Plaintiff claimed she was unable to sit or stand for long periods of
 13 time. (AR 48.) She had surgery on her leg six months prior to the hearing to remedy varicose veins
 14 in her leg caused by thrombosis. (AR 49.) Plaintiff also claimed to have had surgery on her back, as
 15 well as two surgeries on her right arm. (AR 50.) Plaintiff testified she has five "bad" discs in her
 16 back, which caused severe pain and limited her mobility. (AR 50-53.) In addition, Plaintiff claimed
 17 to suffer from a loose coccyx, pain in her left leg and right arm, and bladder issues. (AR 51.) At the
 18 time of the hearing, Plaintiff was using a cane to maintain stability. (AR 49.) She reported taking
 19 pain medications since 2002. (AR 55.) In sum, Plaintiff testified her injuries had rendered her
 20 almost entirely bed-ridden. (AR 56.)

21 **2. The Medical Expert's Testimony**

22 The Social Security Administration's medical expert Dr. Arthur Brovender, a board-certified
 23 orthopedic surgeon, testified at the hearing. (AR 57-66.) Dr. Brovender stated he had reviewed
 24 Plaintiff's case file and her testimony. (AR 57.) Dr. Brovender claimed Plaintiff's injuries at the
 25 end of 2002 were limited to low back pain and right shoulder pain. (AR 58.) To the extent Plaintiff

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 27 ⁷ Though not addressed at the August 21, 2009 hearing, the record indicates Plaintiff worked in the laundry room
 28 at the Loew's Coronado Bay Resort in 2003, where she allegedly suffered another workplace injury. (AR 275.)

1 complained of other symptoms, Dr. Brovender characterized these complaints as “subjective” and
 2 unsupported by the objective findings in the medical record. (AR 58, 61.) Moreover, Dr.
 3 Brovender opined Plaintiff’s hearing testimony regarding the severity of her symptoms had been
 4 exaggerated. (*Id.*)

5 Thus, according to Dr. Brovender, Plaintiff’s injuries did not meet or equal any of the listed
 6 impairments from 20 CFR Part 404, Subpart P, Appendix 1. (AR 62.) He concluded that in 2002
 7 Plaintiff did not have medical conditions sufficiently severe to interfere with her ability to work.
 8 (AR 61.) However, Dr. Brovender found Plaintiff did have exertional limitations that would affect
 9 the type of work she could perform. (AR 62.) Specifically, he testified she could lift only ten
 10 pounds frequently, twenty pounds occasionally, sit for six to eight hours with breaks, and stand and
 11 walk for four hours. (*Id.*) Dr. Brovender further testified she was limited to occasional overhead
 12 reaching.⁸ (*Id.*)

13 3. The Vocational Expert’s Testimony

14 Vocational expert Nelly Katsell also testified at Plaintiff’s hearing. (AR 67-74; 133.) She
 15 stated she had reviewed Plaintiff’s case file and her testimony at the hearing. (AR 67.) Ms. Katsell
 16 identified the administrative designation of each of Plaintiff’s former jobs, most of which were
 17 categorized as “exertion level medium.” (AR 67-69.) In establishing Plaintiff’s residual functional
 18 capacity, the ALJ asked Ms. Katsell a single hypothetical question based on Dr. Brovender’s
 19 testimony. (AR 69.) He asked whether a hypothetical individual sharing Plaintiff’s age, education,
 20 and medical limitations could do the type of work that she had performed prior to her 2002 injury.
 21 (*Id.*) According to the limitations Dr. Brovender set out in his testimony, Ms. Katsell responded that

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 23 ⁸ The record indicates Dr. Brovender testified:

24 She does have limitations. She’s status post fusion so I would say that she can lift 10 pounds frequently,
 25 20 pounds occasionally. She should – she could sit for six to eight hours with breaks. I would say that she
 26 could stand and walk four hours. Combination of either way with breaks. She can bend, stoop and squat
 occasionally. She should not go up ropes, ladders and scaffold. She could go up stairs and ramps
 occasionally. She can push and pull the weights that I gave. She should [INAUDIBLE] reaching overhead
 with her shoulder. She has no limitation of fine fingering. . . .

27 (AR 62.) Because the ALJ adopted all of Dr. Brovender’s testimony as to Plaintiff’s limitations, the Court assumes Dr.
 28 Brovender testified Plaintiff was limited to occasional overhead reaching. (*See* AR 26.)

1 the hypothetical individual would not be able to perform any of Plaintiff's former jobs characterized
 2 as "exertion level medium." (*Id.*) However, given the limitations outlined by Dr. Brovender, Ms.
 3 Katsell opined Plaintiff could perform jobs that were characterized as unskilled and sedentary. (AR
 4 70.) She listed several positions from the DOT, including zipper trimmer, eyedropper assembler,
 5 and ink printer, as occupations Plaintiff could perform notwithstanding her physical limitations.⁹
 6 (AR 70-72.)

7 **D. The ALJ's Findings**

8 After consideration of all the evidence, the ALJ applied the sequential process for
 9 determining disability under the Social Security Act and concluded Plaintiff was not under a
 10 disability, as defined by the SSA, on or before December 31, 2002. (AR 23-32.)

11 First, the ALJ found Plaintiff last met the insured status requirements of the Social Security
 12 Act on December 31, 2002. (AR 25.) He found Plaintiff did not engage in substantial gainful
 13 activity during the period from her alleged onset date of April 1, 2002 through her date last insured
 14 of December 31, 2002. (AR 26.)

15 Through her date last insured, the ALJ found Plaintiff had the following severe impairments:
 16 degenerative joint disease at L3-5 and degenerative disc disease at L5-S1, established by a
 17 discogram (Exhibit 1F) and tendinosis of the supraspinatus tendon with evidence of partial thickness
 18 tearing and subdeltoid effusion, established by an MRI study (Exhibit 42F.) (*Id.*) However, the ALJ
 19 found that through the date last insured, Plaintiff did not have a condition that met or medically
 20 equaled one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.¹⁰ (*Id.*)

21 After careful consideration of the entire record, the ALJ found that through her date last
 22 insured, Plaintiff had the residual functional capacity to lift and carry twenty pounds occasionally,

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 24 ⁹ Plaintiff's attorney emphasized Ms. Katsell's opinion was based on Dr. Brovender's "liberal" assessment of
 25 Plaintiff's limitations. He noted that he could question the vocational expert whether a hypothetical individual sharing
 Plaintiff's age, education, and the medical limitations set forth by Dr. Van Dam could perform these occupations, but he
 stated "it almost speaks for itself." (AR 74.)

26 ¹⁰ As previously discussed, the ALJ noted Plaintiff was diagnosed with symptoms of anxiety and depression,
 27 borderline intellectual functioning and a pain disorder after her date last insured. (AR 26.) He further noted the record
 28 reflects some cervical complaints and an allegation of bladder dysfunction. (*Id.*) However, the ALJ determined there was
 no medical evidence Plaintiff suffered from these conditions on or before her date last insured. (*Id.*)

1 ten pounds frequently, standing and walking four hours in an eight-hour workday, sitting for six
2 hours with ordinary breaks. He found Plaintiff had no other significant limitations except she was
3 limited to occasional overhead reaching with the right arm. (*Id.*)

4 In making this determination, the ALJ recognized there was “a great deal of inconsistency”
5 with respect to the diagnostic evidence and the opinions of the medical sources who examined
6 Plaintiff. (AR 28.) The ALJ noted, for example, Plaintiff underwent a discogram on July 11, 2011,
7 which revealed “slight” degeneration at L3-4 with only a small annular tear, “severe” degeneration
8 at L4-5 with fissuring and a disc bulge, and degenerative disc disease at L5-S1 with an annular tear
9 causing epidural leakage. (*See* AR 212-15.) Plaintiff also underwent an MRI study of a lumbosacral
10 spine in February 2002. (*See* AR 1039-45.) The ALJ observed that “[t]his MRI study failed to
11 observe the ‘severe’ degenerative and other substantial finding noted in the year-earlier discogram.”
12 (AR 28.)

13 The ALJ also considered the opinions of Plaintiff’s treating and examining physicians. He
14 accepted the assessment of Dr. Brovender, finding the medical expert had “particular expertise in the
15 area of medicine at issue in this case” and his opinions were “well supported by the medical record”
16 as a whole. (AR 27.) Moreover, the ALJ noted Dr. Brovender’s assessment was consistent with that
17 of Dr. Weiseltier, an impartial orthopedic consultant. (*Id.*) In this regard, the ALJ noted Dr.
18 Weiseltier opined that Plaintiff could perform a range of “light work” under Social Security
19 disability regulations. (*Id.*) Dr. Weiseltier’s examination also “confirmed a number of positive
20 Waddell signs, which he described as ‘factors of exaggeration.’” (AR 28.) Based thereon, the ALJ
21 concluded:

22 Considering the inconsistent diagnostic evidence, the mixed and inconsistent
23 clinical findings and the fact that there is ample evidence of Waddell signs, strongly
24 suggesting an element of exaggeration or feigned symptoms, which were confirmed
25 by the “agreed” orthopedic consultant, I cannot say that the medical record, on or
before the claimant’s date last insured, reliably establishes that her lumbar
impairments warrant greater functional limitations, or that Dr. Brovender’s
assessment is misplaced. If anything, his assessment appears generous.

26 (*Id.*)

27 While the ALJ recognized the opinions of treating physicians are generally entitled to great
28

1 weight, he rejected Dr. Bernicker and Dr. Van Dam's opinion that Plaintiff was disabled prior to her
2 date last insured for several reasons. (AR 29.) First, the ALJ stated, "it is doubtful that they are the
3 type of treating source contemplated by the regulations, i.e. a long-term, impartial clinician retained
4 without the specter of bias." (*Id.*) Here, the ALJ noted both Dr. Bernicker and Dr. Van Dam were
5 "retained for the purpose of furthering the claimant's workers' compensation litigation." (*Id.*) As a
6 result, the ALJ questioned their objectivity and impartiality in this case. Second, the ALJ
7 emphasized that "questions regarding their objectivity was, apparently, a reason why Dr. Weiseltier
8 was retained as an 'agreed' consultant" in Plaintiff's workers' compensation litigation.¹¹ (*Id.*)
9 Third, the ALJ found Dr. Bernicker and Dr. Van Dam's clinical findings were not supported by the
10 medical record as a whole, as Dr. Weiseltier and Dr. Brovender, impartial medical consultants, both
11 "raised concerns regarding exaggeration by the claimant." (*Id.*)

12 Similarly, the ALJ discredited Plaintiff's testimony regarding her alleged disabling
13 symptoms. (AR 30.) Based on the lack of consistent medical evidence on or before December 31,
14 2002, the ALJ found there was "not enough medical evidence to make her allegations readily
15 believable." (*Id.*) According to the ALJ, Plaintiff's inconsistent statements and actions also
16 undermined her credibility. (*Id.*) Again, the ALJ noted there was "substantial medical evidence of
17 exaggerated, if not feigned physical symptoms," as multiple medical sources found positive Waddell
18 signs and other nonphysiological complaints and presentations. (*Id.*) Plaintiff's complaints of
19 global pain were also inconsistent with the results of her physical examinations. (*Id.*) Moreover, the
20 ALJ found evidence Plaintiff attempted to hide the existence of pre-existing conditions during her
21 workers' compensation litigation. (*Id.*) In sum, the ALJ stated he was unable to accept Plaintiff's
22 claims in the absence of consistent and substantial objective medical support. (*Id.*)

23 After determining Plaintiff's residual functional capacity, the ALJ found Plaintiff was unable
24 to perform any past relevant work, which was a combination of semi-skilled and unskilled work.¹²

26 ¹¹ This Court does not adopt the speculative reasoning of the ALJ on this issue, but does find the ALJ appropriately
27 stated his reasons for rejecting the opinions of Plaintiff's treating physicians. *Lester*, 81 F.3d at 830.

28 ¹² The ALJ accepted vocational expert's testimony that an individual with Plaintiff's residual functional capacity
would be able to perform unskilled, sedentary work. (AR 70.)

1 (*Id.*) The ALJ further found Plaintiff was defined as a younger person and considered illiterate as of
2 her date last insured. (AR 31.) Thus, the ALJ determined, Plaintiff's past relevant work experience
3 afforded no transferrable skills. (*Id.*)

4 Through her date last insured, considering Plaintiff's age, education, work experience and
5 residual functional capacity, the ALJ found there were jobs that existed in significant numbers in the
6 national economy that Plaintiff could have performed. (AR 31.) Here, the ALJ relied on
7 hypothetical questions posed during the vocational expert's testimony. Ms. Katsell testified an
8 individual with Plaintiff's age, education, work experience, and residual functional capacity could
9 perform the requirements of representative occupations, such as zipper trimmer, eye dropper
10 assembler and ink printer. (*Id.*) Accordingly, the ALJ determined Plaintiff was "capable of making
11 a successful adjustment to 'other work' that existed in significant numbers in the national economy."
12 (AR 32.)

13 In light of the foregoing analysis, the ALJ concluded Plaintiff was not under a disability, as
14 defined in the Social Security Act, at any time from April 1, 2002, her alleged onset date, through
15 December 31, 2002, her date last insured. (AR 32.)

16 IV. LEGAL STANDARD

17 To qualify for disability benefits under the Social Security Act, applicants must show two
18 things: (1) they suffer from a medically determinable impairment that can be expected to last for a
19 continuous period of twelve months or more, or would result in death; and (2) the impairment
20 renders applicants incapable of performing the work they previously performed or any other
21 substantially gainful employment that exists in the national economy. *See* 42 U.S.C.A. §§
22 423(d)(1)(A), (2)(A) (West Supp. 2008). An applicant must meet both requirements to be classified
23 as "disabled." *Id.*

24 Sections 205(g) and 1631(c)(3) of the Social Security Act allow applicants whose claims
25 have been denied by the SSA to seek judicial review of the Commissioner's final agency decision.
26 42 U.S.C.A. §§ 405(g), 1383(c)(3) (West Supp. 2008). The Court should affirm the decision unless
27 "it is based upon legal error or is not supported by substantial evidence." *Bayliss v. Barnhart*, 427
28

1 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

2 “Substantial evidence is such relevant evidence as a reasonable mind might accept as
3 adequate to support [the ALJ’s] conclusion[.]” considering the record as a whole. *Webb v. Barnhart*,
4 433 F.3d 683, 686 (9th Cir. 2005) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). It
5 means ““more than a mere scintilla but less than a preponderance”” of the evidence. *Bayliss*, 427
6 F.3d at 1214 n.1 (quoting *Tidwell*, 161 F.3d at 601). “[T]he court must consider both evidence that
7 supports and the evidence that detracts from the ALJ’s conclusion” *Frost v. Barnhart*, 314
8 F.3d 359, 366-67 (9th Cir. 2002) (quoting *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985).

9 To determine whether a claimant is disabled, the Social Security regulations use a five-step
10 process outlined in 20 C.F.R. § 404.1520 (2008). If an applicant is found to be “disabled” or “not
11 disabled” at any step, there is no need to proceed further. *Ukolov v. Barnhart*, 420 F.3d 1002, 1003
12 (9th Cir. 2005) (quoting *Schneider v. Comm’r of Soc. Sec. Admin.*, 223 F.3d 968, 974 (9th Cir.
13 2000)). Although the ALJ must assist the applicant in developing a record, the applicant bears the
14 burden of proof during the first four steps. *Tackett v. Apfel*, 180 F.3d 1094, 1098 & n.3 (9th Cir.
15 1999). If the fifth step is reached, however, the burden shifts to the Commissioner. *Id.* at 1098. The
16 steps for evaluating a claim are as follows:

17 **Step 1.** Is the claimant presently working in a substantially gainful activity?
18 If so, then the claimant is “not disabled” within the meaning of the Social Security
19 Act and is not entitled to disability insurance benefits. If the claimant is not working
in a substantially gainful activity, then the claimant’s case cannot be resolved at step
one and the evaluation proceeds to step two.

20 **Step 2.** Is the claimant’s impairment severe? If not, then the claimant is “not
21 disabled” and is not entitled to disability insurance benefits. If the claimant’s
impairment is severe, then the claimant’s case cannot be resolved at step two and the
evaluation proceeds to step three.

22 **Step 3.** Does the impairment “meet or equal” one of a list of specific
23 impairments described in the regulations? If so, the claimant is “disabled” and
24 therefore entitled to disability insurance benefits. If the claimant’s impairment
neither meets nor equals one of the impairments listed in the regulations, then the
25 claimant’s case cannot be resolved at step three and the evaluation proceeds to step
four.

26 **Step 4.** Is the claimant able to do any work that he or she has done in the
27 past? If so, then the claimant is “not disabled” and is not entitled to disability
28 insurance benefits. If the claimant cannot do any work he or she did in the past, then

1 the claimant's case cannot be resolved at step four and the evaluation proceeds to the
2 fifth and final step.

3 **Step 5.** Is the claimant able to do any other work? If not, then the claimant is
4 "disabled" and therefore entitled to disability insurance benefits. If the claimant is
5 able to do other work, then the Commissioner must establish that there are a
6 significant number of jobs in the national economy that claimant can do. There are
7 two ways for the Commissioner to meet the burden of showing that there is other
8 work in "significant numbers" in the national economy that claimant can do: (1) by
9 the testimony of a vocational expert, or (2) by reference to the Medical-Vocational
10 Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2. If the Commissioner meets this
11 burden, the claimant is "not disabled" and therefore not entitled to disability
12 insurance benefits. If the Commissioner cannot meet this burden, then the claimant is
13 "disabled" and therefore entitled to disability benefits.

14 *Id.* at 1098-99 (footnotes and citations omitted); *see also Bustamante v. Massanari*, 262 F.3d 949,
15 954 (9th Cir. 2001) (giving an abbreviated version of the five steps).

16 Section 405(g) permits this Court to enter a judgment affirming, modifying, or reversing the
17 Commissioner's decision. 42 U.S.C.A. § 405(g). The matter also may be remanded to the Social
18 Security Administration for further proceedings. *Id.* After a case is remanded and an additional
19 hearing is conducted, the Commissioner may modify or affirm the original findings of fact or the
20 decision. *Id.*

21 "If the evidence can reasonably support either affirming or reversing the Secretary's
22 conclusion, the court may not substitute its judgment for that of the Secretary." *Flaten v. Sec'y*
23 *Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). The Court must uphold the denial of
24 benefits if the evidence is susceptible to more than one rational interpretation, one of which supports
25 the ALJ's decision. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

26 V. DISCUSSION

27 Plaintiff requests the Court reverse the Commissioner's final decision and remand the case to
28 the Social Security Administration for further proceedings because the ALJ committed the following
legal errors in rejecting her claim: (1) the ALJ improperly rejected Plaintiff's subjective symptom
testimony; (2) the ALJ improperly rejected the medical opinions of Dr. Bernicker and Dr. Van Dam;
and (3) the ALJ erroneously concluded Plaintiff had the residual functional capacity to perform
other work at step five of the sequential disability analysis. (ECF No. 13 at 6-10.)

Defendant argues the Commissioner's decision, as set forth in the ALJ's written opinion, was
supported by substantial evidence and free of reversible error. (ECF No. 18-1 at 6.)

A. The ALJ Properly Discredited Plaintiff's Subjective Complaints

Plaintiff first argues the ALJ committed legal error in rejecting her subjective symptom testimony because he relied on Waddell's signs as an indication Plaintiff exaggerated or feigned her symptoms. (ECF No. 13-1 at 12.) She further argues the ALJ's reasons for discrediting Plaintiff's testimony were not supported by substantial evidence. (*Id.*)

Defendant argues "the ALJ provided a valid basis for finding Plaintiff not fully credible and his reasons are supported by substantial evidence." (ECF No. 18-1 at 7.)

The ALJ must conduct a two-step analysis in assessing a claimant's subjective testimony. First, "the claimant 'must produce objective medical evidence of an underlying impairment' or impairments that could reasonably be expected to produce some degree of symptom." *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.2008) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1281–82 (9th Cir.1996)). Once a claimant establishes an underlying impairment, medical findings are not required to support the alleged severity of a claimant's symptoms. *Bunnell v. Sullivan*, 947 F.2d 342, 345 (9th Cir. 1991). If the ALJ finds the claimant's testimony about the severity of her pain and impairments unreliable, the ALJ must make a credibility determination with findings sufficiently specific to permit the court to conclude he did not arbitrarily discredit the claimant's testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). In weighing a claimant's credibility, an ALJ may consider several factors, including ordinary techniques of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony by the claimant that appears less than candid. *Tommasetti*, 533 F.3d at 1039. "If the ALJ's finding is supported by substantial evidence, the court 'may not engage in second-guessing.'" *Id.* (quoting *Thomas*, 278 F.3d at 959).

In the instant case, the Court finds the ALJ's adverse credibility determination regarding Plaintiff's alleged disabling symptoms was supported by substantial evidence. First, the ALJ found the inconsistent medical evidence, including the conflicting results from the 2002 MRI and 2001 discogram, undermined Plaintiff's subjective complaints. (AR 28-30; *see also* AR 212-15, 1039-45.) Though lack of objective evidence supporting Plaintiff's symptoms cannot be the sole basis for discounting symptom testimony, the ALJ properly considered it as one factor in his credibility

1 analysis. *Burch v. Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005).

2 Second, the ALJ found “substantial medical evidence of exaggerated, if not feigned physical
3 symptoms.” (AR 30.) Contrary to Plaintiff’s assertion, evidence of symptom exaggeration is a valid
4 basis for discounting a claimant’s credibility. *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir.
5 2003); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). Here, multiple examining
6 physicians, including Drs. Mooney, Ostrup, Weiseltier and Brovender, found positive Waddell signs
7 and other evidence of malingering. (*Id.*; see also AR 58-61, 238, 245-46, 265-67.) To the extent
8 Plaintiff’s treating physicians, Dr. Bernicker and Dr. Van Dam, found otherwise, the ALJ provided
9 clear and convincing reasons for discounting their opinions. (AR 29.)

10 Third, the ALJ relied on evidence of Plaintiff’s apparent attempt to hide pre-existing
11 conditions during her workers’ compensation litigation. (AR 30.) While receiving treatment for her
12 February 2002 injury, Plaintiff did not disclose that she underwent a discogram in July 2001 to
13 evaluate ongoing back and lower extremity pain. (*Id.*; see also AR 212-41.) Plaintiff seems to argue
14 the July 2001 discogram was dated incorrectly. (ECF No. 13-1 at 12.) Even assuming the discogram
15 was performed in 2002, the Court finds the ALJ’s reasoning was supported by other evidence in the
16 record. Plaintiff’s hearing testimony demonstrates she may have also attempted to hide a November
17 2001 work-related injury to her shoulder during her workers’ compensation litigation. (See AR 50.)

18 Based on the foregoing, the Court finds the ALJ provided sufficiently specific analysis to
19 conclude he did not arbitrarily discredit Plaintiff’s subjective testimony. *Thomas*, 278 F.3d at 958.
20 Accordingly, the Court hereby **DENIES** Plaintiff’s motion for summary judgment (ECF No. 13) and
21 **GRANTS** Defendant’s cross motion for summary judgment (ECF No. 18) as to this claim.

22 **B. The ALJ Properly Discredited the Opinions of Plaintiff’s Treating Physicians**

23 Plaintiff further argues the ALJ committed legal error in discounting the opinions of Drs.
24 Bernicker and Van Dam, Plaintiff’s treating physicians. (ECF No. 13-1 at 7-8.) She contends the
25 ALJ failed to provide valid reasons for finding Drs. Bernicker and Van Dam unreliable. (*Id.*)

26 Defendant claims the ALJ reasonably discredited Drs. Bernicker and Van Dam’s
27 unsupported and contradicted medical opinions. (ECF No. 18-1 at 9.)

28 The Ninth Circuit distinguishes among the opinions of three types of physicians: (1) those

1 who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant
 2 (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining
 3 physicians). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). “It is not necessary, or even
 4 practical, to draw a bright line distinguishing a treating physician from a non-treating physician.
 5 Rather, the relationship is better viewed as a series of points on a continuum reflecting the duration
 6 of the treatment relationship and the frequency and nature of the contact.” *Le v. Astrue*, 529 F.3d
 7 1200, 1201 (9th Cir. 2008) (quoting *Benton v. Barnhart*, 331 F.3d 1030, 1038 (9th Cir.2003)). In
 8 general, a physician qualifies as a treating source if the claimant sees him with a frequency
 9 consistent with accepted medical practice for the type of treatment and/or evaluation required for the
 10 medical condition. *Benton v. Barnhart*, 331 F.3d 1030, 1036 (9th Cir. 2003).

11 Opinions of treating physicians may be rejected only under certain circumstances. *See*
 12 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). “[W]here the treating
 13 doctor’s opinion is not contradicted by another doctor, it may be rejected only for ‘clear and
 14 convincing’ reasons.” *Lester*, 81 F.3d at 830 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th
 15 Cir. 1991)); *see also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). “Even if the treating
 16 doctor’s opinion is contradicted by another doctor, the Commissioner may not reject this opinion
 17 without providing ‘specific and legitimate reasons’ supported by substantial evidence in the record.”
 18 *Lester*, 81 F.3d at 830 (citing *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

19 Here, the ALJ found Dr. Bernicker and Dr. Van Dam’s clinical findings could not be
 20 replicated by other physicians. (AR 29.) For instance, while multiple examining physicians,
 21 including Drs. Mooney, Ostrup, Weiseltier and Brovender, found positive Waddell signs and other
 22 evidence of exaggeration, Dr. Van Dam maintained that she did not present any signs of “psychiatric
 23 illness or malingering.” (AR 348, 352.) Likewise, Dr. Bernicker did not find any signs of
 24 malingering during his exams. (AR 224-31, 1026-27.) Dr. Bernicker and Dr. Van Dam also opined
 25 Plaintiff was disabled prior to her date last insured. (*Id.*; *see also* AR 1020-38, 1050-57.)
 26 Conversely, Dr. Brovender and Dr. Weiseltier found Plaintiff capable of performing “light work”
 27 under Social Security disability regulations. (AR 27; *see also* AR 62-66, 248-73.)

28 Even if Dr. Bernicker and Dr. Van Dam’s opinions were contradicted by those of other

1 physicians, Plaintiff argues the ALJ failed to reject their findings for specific and legitimate reasons.
 2 (ECF No. 13-1 at 10-11.) In his written opinion, the ALJ explained he discounted the opinions of
 3 Drs. Bernicker and Van Dam because their opinions lacked “basic indicia of reliability.” (AR 29-
 4 30.) The record supports the ALJ’s finding that “these doctors were retained for the purpose of
 5 furthering the claimant’s workers’ compensation litigation, as evidenced by the fact that their reports
 6 were not directed to the patient, as one would expect within a normal treatment relationship, but to
 7 her workers’ compensation attorney and insurance adjusters.” (AR 29; *see also* 224-32, 342-60,
 8 379-517, 952-61, 1021-38.) The record further supports the ALJ’s suspicion of “improper medical
 9 advocacy.” (AR 28.) For example, in a letter to Plaintiff’s workers’ compensation attorney, Dr. Van
 10 Dam stated:

11 In my opinion, this unfortunate woman has been caught in the vortex of a system
 12 that has lost the focus on why it exists, to fairly compensate and care for injured
 13 workers. She has been suffering from injuries to her right shoulder and lumbar
 14 spine for over three years. She was long ago cleared psychologically, which was an
 issue raised by Dr. Harvey Wieseltier. She is not going to improve without surgery,
 which was recommended months ago. . . .

15 (AR 451.) It is not unreasonable to assume treating physicians would withhold their opinions on the
 16 workers’ compensation system in a normal treatment relationship. Finally, the ALJ stated the parties
 17 would not have retained Dr. Weiseltier, an “agreed” medical consultant, unless they questioned her
 18 treating physicians’ objectivity.¹³ (AR 29.)

19 Based thereon, the Court finds the ALJ provided “‘specific and legitimate reasons’ supported
 20 by substantial evidence in the record” in discrediting the opinions of Plaintiff’s treating physicians,
 21 Drs. Bernicker and Van Dam. *Lester*, 81 F.3d at 830. Accordingly, the Court hereby **DENIES**
 22 Plaintiff’s motion for summary judgment (ECF No. 13) and **GRANTS** Defendant’s cross motion for
 23 summary judgment (ECF No. 18) as to this claim.

24 **C. The ALJ Properly Relied on Vocational Expert Testimony**

25 Plaintiff contends the ALJ’s findings that Plaintiff could transition to other work was based
 26 on legal error and not supported by substantial evidence. (ECF No. 13-1 at 9.) It appears Plaintiff
 27

28 ¹³ As previously stated, this Court does not adopt the speculative reasoning of the ALJ on this issue, but does find
 the ALJ appropriately stated his reasons for rejecting the opinions of Plaintiff’s treating physicians. *Lester*, 81 F.3d at 830.

1 objects to the vocational expert's testimony that a person limited to occasional overhead reaching
 2 could perform the occupations of zipper trimmer, eye dropper assembler and ink printer. Plaintiff
 3 seems to argue these occupations require constant reaching, which she is incapable of performing.
 4 (*Id.*; ECF No. 19 at 2.)

5 Defendant argues the ALJ properly relied on the vocational expert's testimony as all of the
 6 jobs identified in his opinion do not exceed Plaintiff's limitations. (ECF No. 18-1 at 14.)

7 Once a claimant has established that he or she suffers from a severe impairment that prevents
 8 claimant from returning to former employment, the claimant has made a prima facie showing of
 9 disability. At this point—step five— the burden shifts to the Social Security Administration to show
 10 claimant can perform some other work that exists in significant numbers in the national economy,
 11 taking into consideration the claimant's residual functional capacity, age, education, and work
 12 experience. *See* 20 C.F.R. § 404.1560(b)(3). Social Security Ruling ("SSR") 00-4p governs the use
 13 of occupational evidence. *Massachi v. Astrue*, 486 F.3d 1149, 1150 (9th Cir. 2006); *see* SSR 00-4p,
 14 available at 2000 WL 1898704 at *2. According to SSR 00-4p, at step five of the sequential
 15 evaluation, an ALJ is to "rely primarily on the DOT ... for information about the requirements of
 16 work in the national economy." *Id.* An ALJ may also call upon a vocational expert to provide
 17 occupational evidence through testimony at a disability benefits hearing. *Id.*; *see also Tackett v.*
 18 *Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999). As part of a disability determination, an ALJ has an
 19 "affirmative responsibility" to address any conflicts between the vocational expert's testimony and
 20 information contained in the DOT as to the requirements of a job. *Massachi*, 486 F.3d at 1152-53.

21 In this case, Plaintiff argues the vocational expert's testimony conflicted with information
 22 contained in the DOT, yet the ALJ failed to elicit testimony on this conflict.¹⁴ (ECF No. 13-1 at 9.)
 23 At Plaintiff's hearing, the medical expert testified Plaintiff's shoulder injury prevented her from
 24 overhead reaching. (AR 62.) Ms. Katsell, the vocational expert, opined Plaintiff could perform the
 25

26 ¹⁴ The Court notes the ALJ asked Ms. Katsell only one hypothetical question based on Dr. Brovender's testimony.
 27 (AR 69.) He did not ask Ms. Katsell hypothetical questions based on Plaintiff's subjective symptom testimony, nor did he
 28 ask questions based on the testimony of her treating physicians. Plaintiff does not seem to raise this issue in her Motion for
 Summary Judgment. (ECF No. 13-1.) Nevertheless, the Court finds the ALJ's limited questioning was not objectively
 unreasonable because the ALJ discredited Plaintiff's subjective symptom testimony and disregarded the testimony of
 Plaintiff's treating physicians, Drs. Van Dam and Bernicker.


1 job of zipper trimmer, eyedropper assembler and ink printer, notwithstanding the limitations
 2 described by the medical expert. (AR 70.) Although the ALJ did not refer to the DOT during the
 3 hearing, he questioned the vocational expert on job limitations as described in the DOT. The ALJ
 4 also asked Ms. Katsell whether her testimony was in conformance with the DOT and she responded
 5 “yes.” (AR 70.)

6 There is substantial evidence in the record indicating Plaintiff is limited to occasional
 7 *overhead* reaching, with no such limitation on frequent or constant reaching generally. (AR 26.)
 8 Plaintiff fails to provide any support for the proposition that a job requiring frequent or constant
 9 reaching would necessarily require constant overhead reaching as well. Rather, other cases have
 10 reviewed the same provisions of the DOT and found jobs requiring either “frequent” or “constant”
 11 reaching do not require reaching or handling at or above the shoulder-level. *See Rodriguez v.*
 12 *Astrue*, 2008 WL 2561961, at *2 (C.D. Cal. 2008). The vocational expert’s testimony that Plaintiff
 13 could perform these positions did not conflict with the DOT job descriptions. Based thereon, the
 14 Court finds the ALJ did not commit legal error in adopting the testimony of the vocational expert.
 15 Accordingly, the Court hereby **DENIES** Plaintiff’s motion for summary judgment (ECF No. 13) and
 16 **GRANTS** Defendant’s cross motion for summary judgment (ECF No. 18) as to this claim.

17 V. CONCLUSION

18 After a thorough review of the record in this matter and based on the foregoing analysis, IT
 19 IS HEREBY ORDERED that Plaintiff’s Motion for Summary Judgment be **DENIED**, and
 20 Defendant’s Cross Motion for Summary Judgment be **GRANTED**.

21 DATED: September 26, 2011

22 
 23 Hon. Jeffrey T. Miller
 United States District Judge

24 cc: The Honorable Louisa S Porter
 25 All parties
 26
 27
 28